

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

KENNETH W. BENZO,

Case No. 14-CV-4138 (MJD/SER)

Petitioner,

v.

REPORT AND RECOMMENDATION

UNITED STATES OF AMERICA,

Respondent.

Petitioner Kenneth W. Benzo filed a petition for a writ of habeas corpus under 28 U.S.C. § 2241. In an order dated October 22, 2014, this Court observed Benzo's petition was unclear about whether he had first exhausted available state remedies before seeking federal habeas relief. *See* ECF No. 3 at 2 (citing *Sacco v. Falke*, 649 F.2d 634, 635-36 (8th Cir. 1981)). Accordingly, this Court ordered Benzo to file an affidavit no later than November 24, 2014 showing how he had exhausted all available state remedies, failing which it would be recommended that this action be dismissed for failure to prosecute. *See* Fed. R. Civ. P. 41(b).

That deadline has now passed, and Benzo has not filed the required affidavit. Indeed, Benzo has not communicated with the Court at all about this case since this Court's October 22 order. Accordingly, this Court now recommends, in accordance with its prior order, that this action be dismissed without prejudice under Rule 41(b) for failure to prosecute. *See Henderson v. Renaissance Grand Hotel*, 267 Fed. App'x 496, 497 (8th Cir. 2008) (per curiam) ("A district court has discretion to dismiss an action under Rule 41(b) for a plaintiff's failure to prosecute, or to comply with the Federal Rules of Civil Procedure or any court order.").

RECOMMENDATION

Based upon the foregoing, and on all of the files, records, and proceedings herein, IT IS
HEREBY RECOMMENDED THAT:

1. This action be DISMISSED WITHOUT PREJUDICE under Fed. R. Civ. P. 41(b) for failure to prosecute.
2. Petitioner Kenneth W. Benzo's application to proceed *in forma pauperis* [ECF No. 2] be DENIED AS MOOT.

Dated: December 8, 2014

s/Steven E Rau
Steven E. Rau
U.S. Magistrate Judge

NOTICE

Pursuant to Local Rule 72.2(b), any party may object to this Report and Recommendation by filing with the Clerk of Court, and serving all parties by **December 22, 2014**, a writing that specifically identifies the portions of the Report to which objections are made and the bases for each objection. A party may respond to the objections within fourteen days of service thereof. Written submissions by any party shall comply with the applicable word limitations provided for in the Local Rules. Failure to comply with this procedure may operate as a forfeiture of the objecting party's right to seek review in the Court of Appeals. This Report and Recommendation does not constitute an order or judgment from the District Court, and it is therefore not directly appealable to the Eighth Circuit Court of Appeals.